STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
ALEJANDRO BARRERA,	)	
	)	CHARGE NO. **1998CA2519**
Complainant,	)	EEOC NO. **21B981914**
	)	ALS NO. **11023**
and	)	
	)	
LAKESIDE BUILDING MAINTENANCE, INC.	)	
	)	
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter is ready for a Recommended Order and Decision pursuant to the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.). A public hearing was held before me in Chicago, Illinois on January 30, 2001. The Respondent has filed a post-hearing brief. Complainant, who is pro se, did not file a post-hearing brief. Accordingly, this matter is ripe for decision.

Contentions of the Parties

In the instant Complaint, Complainant contends that he was the victim of national origin and ancestry discrimination when Respondent: (1) subjected Complainant to slurs based on his national origin and ancestry, such as statements allegedly made several times a week from Robert Ronald, Operational Manager (non-Mexican / non-Hispanic), that Mexicans were lazy and too slow; (2) Respondent required Complainant to write down the tasks he completed and the amount of time Complainant took to complete each task, but would not require non-Hispanic, non-Mexican employees to write down such information; and (3) that in May of 1998, Robert Ronald screamed at Complainant, approximately one foot from Complainant's face, but did not treat non-Mexican, non-Hispanic employees in a comparable manner.

Respondent asserts that Complainant has not established a *prima facie* case of unlawful discrimination because of his failure to produce any instances where a Lakeside employee demonstrated any discriminatory animus towards him. Respondent contends that Lakeside treated the Complainant in a legitimate, non-discriminatory manner.

Findings of Fact

Based upon the record in this matter, I make the following findings of fact:

1. Complainant's national origin is Mexican and his ancestry is Hispanic.

2. Complainant has been employed by Lakeside Building Maintenance at 500 North Michigan Avenue, Chicago, Illinois since January 1, 1997.

3. Prior to January 1, 1997, Complainant was an employee of American Building Maintenance for a period of at least 20 years at the 500 North Michigan Avenue location.

4. The property manager for 500 North Michigan Avenue was PM Realty during the time Complainant was working at the 500 North Michigan Avenue location.

5. Complainant's supervisors at the time of the events giving rise to this Complaint were Robert Ronald, Operations Manager for Lakeside Building Maintenance, and Raul Garcia, Assistant to Robert Ronald.

6. Complainant has never been employed by PM Realty.

7. Complainant's prior position with American Building Maintenance was eliminated upon the request of PM Realty and Complainant's former job duties were reassigned to a union engineer.[1]

8. PM Realty complained to Lakeside Building Maintenance that Complainant was

[1] Complainant belonged to Local 25, while the new engineer belonged to Local 399. Complainant's prior job required that the person belong to Local 399. Complainant was subsequently placed in a less-salaried position and he declined to move to another building because he would lose his seniority.

too slow in completing his assigned work duties.

9. Complainant sought medical treatment with Union Health Services on May 27 1998 for what he claimed to have been for asbestos exposure for a period of 18 years. As a result of the medical examination, Complainant was referred to see a psychiatrist for "anxiety / paranoid personality disorder."

10. The Occupational Safety and Health Administration (OSHA) conducted an inspection for asbestos at the 500 North Michigan Avenue building, which was completed on June 6, 1998. No friable or disturbed asbestos fibers were found in the building.

11. Javier Martinez worked for Lakeside Building Management for 2 months from January 1, 1997 to March 1, 1997, until he left their employ due to his mother's illness in Mexico.

12. On May 26, 1998, Evelyn Mejias, who was married to Complainant, at the time of the incident in question, was not physically on the loading dock of the 500 North Michigan Avenue building. Ms. Mejias did not hear any comments made to Complainant that pertained to his national origin or that he was a lazy or slow Mexican.

13. During the May 26, 1998 loading dock incident, Complainant refused to cooperate with the investigation into his claim of exposed asbestos that he alleged where in the 500 North Michigan Avenue building.

14. On May 26, 1998, Robert Ronald, while on the loading dock, did not take Complainant to the side and yell and scream at him while one foot from his face.

15. In October of 1997, Robert Ronald advised Complainant to keep a diary of any assigned job tasks given to him by PM Realty and the time it took him to complete such tasks for

the purpose of protecting himself from PM Realty's claim that he was performing his tasks too slowly.

16. Robert Ronald did not state to Complainant that he was a "lazy Mexican" or words to that effect.

17. Respondent did not treat Complainant differently from other non-Mexican or non-Hispanic employees.

Conclusions of Law

1. Complainant is an "employee" and Respondent is an "employer" as those terms are defined by the Illinois Human Rights Act, 775 ILCS 5/2-101(A)(1)(a) and 5/2-101(B)(1)(a), respectively.

2. The Commission has jurisdiction over the parties and the subject matter of this action.

3. Complainant has failed to establish a *prima facie* case of national origin and ancestry discrimination under the under the theories of harassment and disparate treatment in that Complainant failed to show by the preponderance of the evidence that the Respondent called him a "lazy Mexican" and that Respondent screamed in Complainant's face while standing one foot away from him.

4. Complainant established a *prima facie* case of discrimination in that Respondent required Complainant to write a diary of his work assignments for the alleged purpose of harassment and disparate treatment based upon his national origin and ancestry.

5. Lakeside had a legitimate business reason to present Complainant with the complaints made by PM Realty that Complainant was too slow.

6. Lakeside had a legitimate business reason to encourage Complainant to take corrective action by keeping a diary of work assignments in response to complaints from PM Realty that Complainant was too slow.

7. Complainant has failed to prove by a preponderance of the evidence that the reasons given by Respondent for informing Complainant of the complaints and for advising Complainant to keep a diary of his job assignments were a pretext for discrimination.

8. Complainant has failed to prove that Respondent unlawfully discriminated against him by advising him to write down information of his job tasks in a notebook.

Determination

Complainant has failed to prove by a preponderance of the evidence that he was the victim of national origin and ancestry discrimination prohibited by Section 2-102(A) of the Act, pursuant to Section 7A-102(G)(1) of the Act.

Discussion

In a case alleging discrimination based upon national origin and ancestry, the Commission and the courts have applied a three-step analysis to determine whether there has been a violation of the Illinois Human Rights Act. (See, for example, Thomas and Merrill Dow Pharmaceutical, 14 Ill. HRC Rep. 81 (1984), and Burnham City Hospital v. Human Rights Commission, 126 Ill.App.3d 999, 467 N.E.2d 635 (1984).) Under this approach, the Complainant must first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. Then, the burden shifts to the Respondent to articulate a legitimate, non-discriminatory reason for the action taken against Complainant. If the Respondent is successful in its articulation, the presumption of unlawful discrimination is no longer present in the case, (Texas Department of Community Affairs v. Brudine, 450 U.S. 248,

101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)), and the Complainant is required to prove by a preponderance of the evidence that the Respondent's articulated non-discriminatory reason is a pretext for unlawful discrimination. This latter requirement merges with the Complainant's ultimate burden of proving that the Respondent discriminated unlawfully against the Complainant. See, Village of Oak Lawn v. Human Rights Commission, 113 Ill.App.3d 221, 478 N.E.2d 1115, 88 Ill.Dec. 507 (1985). In essence, the Complainant must show that a discriminatory reason more likely motivated the employer or that the employer's proffered explanation is unworthy of credence. See, Stanley Clark v. Illinois Human Rights Commission and Rodriguez & Villalobos, 312 Ill.App.3d 582, 728 N.E.2d 582, 245 Ill.Dec. 500 (1st Dist. 2000).

In the instant case before me, the record shows that Complainant worked at the 500 North Michigan Ave. building, which was managed by PM Realty, for a period of approximately 22 years. For 20 of those years, he worked for American Building Maintenance. He was entrusted with all the keys of the building and worked with the engineering staff at the building. In January of 1997, Lakeside Building Maintenance, Inc. placed a bid to take over the maintenance contract of American Building Maintenance and was awarded the bid. When Lakeside took over the cleaning contract, Complainant, and other American Building Maintenance employees, became Lakeside employees. Complainant was a member of Local 25, which is a maintenance employee position. Complainant's position was eliminated and an engineer from Local 399 took over his previous duties. Complainant was made to give back the keys to the building. Complainant was given a choice of taking the position of a day-porter at a lower rate of pay, transfer to another building, where he would lose his seniority, or be laid-off. Complainant chose to take the day-porter position.

It is clear by the testimony of the Complainant during this hearing that he was angered and felt slighted by the new changes that were made pertaining to his employment status in the building. Complainant, in his own words, could not comprehend how after working 22 years for the building where he basically gave up his youth he was no longer trusted with the keys of the building and was made to become a day-porter. Complainant expressed his anger over the new changes, and in addition alleged he was harassed and treated differently by the new maintenance company due to his national origin and his ancestry and also called a "lazy Mexican."

Racial Slurs Pertaining to National Origin and Ancestry

The Commission rules set out that an employer has an affirmative duty to maintain a working environment free of harassment on the basis of national origin; that ethnic slurs relating to an individual's national origin constitute harassment when this conduct has the purpose or effect of creating an intimidating, hostile or offensive working environment or interfering with an individual's work performance; and that an employer will be held responsible for its acts and those of its agents and supervisory employees. 56 Ill.Admin. Code §5220.900. Racial harassment has been defined to include a steady barrage of opprobrious racial comment. Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981).

Complainant contends that from October 1997, until May of 1998, on a continuing basis, Respondent subjected Complainant to slurs based on his national origin and ancestry, such as statements several times a week from Operations Manager Robert Ronald, who is non-Mexican and non-Hispanic, that Mexicans are lazy and too slow. Complainant's testimony regarding this matter is baseless and contradictory at best. During direct testimony, Complainant stated that, "…the building [told] [Mr. Ronald] that I'm too slow." He goes on to say, "And I always go the speed at a little bit faster because the office of the building was complaining about me [being]

too slow." Complainant further testified that, "The office of the building called Lakeside [through] Raul came by and told me the office of the building [was] complaining about me being too slow."[2] Yet, on cross-examination the Complainant states that it was Mr. Ronald who said he was too slow. The Complainant attributes the remark that he was too slow to Mr. Ronald directly and denies that Mr. Ronald ever told him that it was PM Realty who was complaining. More strikingly, is the fact that although Complainant alluded to references regarding his national origin and ancestry during his opening statement, his entire direct testimony and cross-examination is totally void of any testimony that Mr. Ronald or anyone else for that matter specifically made the remark that he was a "lazy Mexican."

Complainant presented Javier Martinez, who worked with Complainant for 12 years, as a witness. Mr. Martinez testified that Robert Ronald had called him a "lazy Mexican" a few times during the three month period he worked for Lakeside. This is in contrast to Complainant's assertion that this racial epithet was used on a continuous basis, several times a week. Mr. Martinez did not state that he heard Mr. Ronald call the Complainant a "lazy Mexican." At one point of Mr. Martinez' testimony, the Complainant asked him specifically, "And the prejudice that Bob always used to use against us, could you tell us how he used to call us?" Mr. Martinez' reply was that Mr. Ronald was always swearing at them and using the word "fuckin." Also, when asked how he and the Complainant were treated by Lakeside, Mr. Martinez stated that they were harassed, but did not comment on any racial slurs. Mr. Martinez contradicted his earlier statement in which he claimed that Mr. Ronald called him a "lazy Mexican." In terms of the credibility of Mr. Martinez' testimony, I find it not to be credible. In addition to Mr. Martinez' obvious contradictory statements in his testimony, is the problematic situation involving the

[2] Raul Garcia is Robert Ronald's Assistant and one of Complainant's immediate supervisors.

reason he left Lakeside after only working for them for three months. Mr. Martinez testified that he left Lakeside because of the harassment. After opposing counsel confronted Mr. Martinez with a document that he signed indicating that he requested and was granted a leave of absence from March 3, 1997 to June 3, 1997 because of a illness to his mother who was in Mexico, Mr. Martinez stated that he lied on the request form so that he could look for a job while still being employed with Lakeside. To say the least, Mr. Martinez' admission in the hearing that he had lied did not bolster his testimony.

Robert Ronald testified that he never told the Complainant that he was a "lazy Mexican" or words to that effect, and that he had personal contact with the Complainant once every six weeks. Mr. Ronald further testified that he received complaints from PM Realty through Mike Monahan that Complainant would take a long time in completing his assignments. Mr. Ronald, in turn, informed Complainant about these complaints. Mr. Ronald also testified that he did not receive any complaints about Javier Martinez being slow in completing his assignments.

In the case of The Village of Bellwood Board of Fire and Police Commissioners v. The Human Rights Commission, et al., 184 Ill.App.3d 339, 541 N.E.2d 1248, 133 Ill. Dec. 810 (1st Dist. 1989), the Complainant alleged that racial slurs pervaded his working environment, and as such suffered discrimination based on race and was the victim of racial harassment. The ALJ heard conflicting evidence that was offered by the parties and found that there was a pervasive, hostile working environment. The appellate court found that the record adequately showed that the Complainant was subjected to a continuous stream of racially derogatory comments. The court noted that this type of racial harassment was exactly what the HRA sought to prevent. The court also pointed out that as the Commission noted in its order and decision, resolution of the case turned on a determination of credibility. The court noted that, "We believe the ALJ was in

the best position to evaluate the credibility of the witnesses, and that if the issue before the trier of fact turns on conflicting testimony and the credibility of witnesses, its determination should be sustained. (Village of Bellwood, 184 Ill.App.3d 339, 541 N.E.2d 1248, 133 Ill. Dec. 810 (1st Dist. 1989)). In this instance, I find the record void of evidence to support Complainant's contention that Robert Ronald used the derogatory term "lazy Mexican." For the reasons stated above, I do not find the testimony of the Complainant or Javier Martinez to be credible. As such, Complainant has not established a *prima facie* case by a preponderance of the evidence that Respondent engaged in racial harassment due to Complainant's national origin and/or ancestry. I also find that Respondent had a legitimate business reason, which was lawful and nondiscriminatory, to present Complainant with the complaints made by PM Realty that the Complainant was too slow.

Disparate Treatment

Complainant alleges that from October of 1977 until May of 1998, Respondent would require him to write down in a notebook the tasks he completed and the amount of time Complainant took to complete each task, but would not require non-Hispanic, non-Mexican employees to write down such information. The ultimate burden of proving a charge of unlawful discrimination remains at all time with the Complainant. Zaderaka v. Illinois Human Rights Comm'n, 131 Ill.2d 172, 545 N.E.2d 684, 137 Ill. Dec. 31 (1989). In this instance, Complainant has shown that he is a member of a protected class; Mexican/Hispanic. Complainant has also shown that he was told that he should write a journal of his work activities throughout the day with starting and finishing times for each of the tasks he performed. Javier Martinez testified that he was also was made to write down his work activities in a journal. The Complainant entered into evidence two of his notebook journals, but did not present any of the journals from

Mr. Martinez. Complainant did not present any names of Lakeside employees who were similarly situated nonmembers of his class and who were not made to write a journal. Even though that may be the case, I believe Complainant has proved a *prima facie* case of discrimination, utilizing indirect evidence, that similarly situated *employees* were treated more favorably, utilizing the ruling found in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817.

Since a *prima facie* case has been established, a rebuttable presumption arises that the Respondent unlawfully discriminated against the Complainant. It now falls upon Respondent to rebut the presumption by articulating, not proving, a legitimate, nondiscriminatory reason for its action. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 67 L.Ed.2d 207, S.Ct. 1089 (1981). Robert Ronald testified that he suggested to Complainant that he write down the times he started and finished his jobs in a notebook as a way to counter any complaints made by PM Realty that he was performing his job tasks too slowly. Mr. Ronald also testified that although he was aware that the Complainant was writing down his job tasks in a notebook, he never checked them or reviewed their contents. Mr. Ronald further testified that he had counseled other Lakeside employees who had a similar problem to keep a journal. I find that the Respondent has carried its burden of production, thus the presumption of unlawful discrimination falls and Complainant must now prove by a preponderance of the evidence that the Respondent's articulated reason was not its true reason, but was instead a pretext for unlawful discrimination.

The record shows that Complainant was asked to write a journal of his job tasks. The record also shows that other Lakeside employees were also asked to write journals not because of their national origin or ancestry, but because they fell into a category of employees who had complaints made against them that they were performing their assigned job tasks too slowly.

Respondent has shown that they had a legitimate, nondiscriminatory business reason to ask Complainant and other slow working employees to keep such a journal. Complainant has not presented any evidence that this practice was mandatory and that he would be reprimanded if he refused to keep a journal. In this case, Complainant is attempting to establish employment discrimination by showing disparate treatment. Proof of discriminatory motive is required under the disparate treatment theory. Burnham City Hospital v. Human Rights Comm'n, 126 Ill.App.3d 999, 467 N.E.2d 635, 81 Ill. Dec. 764 (1984). Respondent has not met his burden of persuading this trier of fact that Respondent unlawfully discriminated against him or that Respondent's motive in having him keep a journal was discriminatory.

Complainant also alleges, as part of his Complaint, that in May of 1998, Robert Ronald screamed at Complainant, approximately one foot from Complainant's face, but did not treat non-Mexican, non-Hispanic employees in a comparable manner. The standard used to determine whether Complainant proved a case of unlawful discrimination based upon national origin and/or ancestry in this claim is the same as discussed *supra*. Complainant must first prove by the preponderance of the evidence a *prima facie* case of discrimination by direct or indirect evidence. In this case, Complainant claims that he reported an asbestos problem to Lakeside through Marian Nussbaumer, Senior Vice-President of West Management at Lakeside. Complainant claimed that there was a problem of exposed asbestos for over 18 years in the 500 North Michigan Avenue building. Ms. Nussbaumer called her staff down to the building's loading dock, including Robert Ronald. Complainant stated that he was asked to show the staff members where they could locate the exposed asbestos and he showed them the sites. Complainant testified that during that time, Ronald Robert began yelling 2 inches away from his face, asking him where the asbestos was. Complainant testified that Robert Ronald used

profanity, but did not mention any racial slurs or comments. Complainant also testified that Mr. Ronald took him aside to another room where he screamed at him to give him his keys and other items. Complainant claimed he was subsequently reprimanded for reporting the asbestos problem in the building. Complainant did not name any non-Mexican, non-Hispanic employees who were in a similar situation and who were treated more favorably.

As part of his evidence, Complainant introduced Evelyn Mejias as a witness.[3] Ms. Mejias testified that she was at the loading [dock] at the time of the incident and saw a number of men yelling and screaming at Complainant. Ms. Mejias further testified that she saw one particular man come close enough to kiss the Complainant while yelling at him. Ms. Mejias also testified that the man went into a room with Complainant where he yelled for him to give him the keys. On cross-examination, Ms. Mejias stated that she was not on the loading dock during the incident, but was inside a car about 15 to 20 feet away. Ms. Mejias also stated that she did not know the name of the man who was screaming at Complainant, but could identify him if she saw him. Ms. Mejias further stated that she did not hear any racial slurs or comments.

Marian Nussbaumer and Robert Ronald both testified that when they approached the Complainant and asked him to show the staff the asbestos he refused. Mr. Ronald stated he warned Complainant that he would be reprimanded if he did not cooperate. Complainant refused to cooperate and he was ordered to turn over his keys and subsequently suspended. Mr. Ronald denied yelling or screaming at Complainant. Ms. Nussbaumer corroborated the account given by Mr. Ronald and also denied that Mr. Ronald yelled or screamed at Complainant. Both witnesses also stated that Mr. Ronald did not make any racial slurs or comments towards the Complainant.

[3] Evelyn Mejias was married to Complainant at the time of the incident in question, but were later divorced.

Based upon the record, I do not find the testimony of Evelyn Mejias to be credible. Besides the contradictory statements made by Ms. Mejias regarding the incident, is the fact that she claimed to have heard what the unidentified man was yelling at Complainant when they were inside the building, while she was outside in a car. It would have been impossible for the witness to overhear the conversation under those circumstances. More incredible is the assertion she made that she did not know the unidentified man's name, but could identify him if she saw him. Both Ms. Mejias and Robert Ronald were present at the hearing as witnesses, yet she failed to identify him as being the person who was yelling at the Complainant. It should also be noted that Ms. Mejias stated that the two men were close enough together to kiss, while Complainant's Complaint indicated they were a foot away from each other.

I also do not find the testimony of Complainant to be credible. Complainant stated Mr. Ronald was 2 inches away from him, while his Complaint indicates he was a foot away. In regards to the situation, it is apparent that Complainant refused to cooperate in the investigation into the claim he made of asbestos. For that reason, Complainant was suspended. The record showed that an inspection was conducted by OSHA in which no asbestos problem was found in the building. It should be noted that the Complainant was so insistent about this perceived asbestos problem that he went to see a doctor about his health. Complainant testified that he saw the doctor because he was experiencing breathing problems. The medical record submitted into evidence by Respondent clearly shows that Complainant saw the doctor because of the asbestos problem. The medical record also showed that Complainant was diagnosed as having "anxiety / paranoid personality disorder" and was referred to a psychiatrist.

The Complainant has the burden of establishing a *prima facie* case of unlawful discrimination by a preponderance of the evidence. Texas Department of Community Affairs v.

Brudine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed2d 207 (1981). In this instance, Complainant has failed in its burden of establishing a *prima facie* case. The record does not support Complainant's allegation that on May 26, 1998, Robert Ronald yelled and screamed at him while standing one foot away, and that other non-Mexican, non-Hispanic employees were not treated similarly.

The Complainant, who appeared pro se, presented a number of other complaints that were either not part of his initial Complaint filed with the Commission or were part of the Department charges which were dismissed or pertained to a party not named as a Respondent in this matter. A decision rendered by an ALJ must conform to requirements set out in the Illinois Human Rights Act, 775 ILCS 5/8A-102(I)(1), which reads; "When all testimony has been taken, the hearing officer shall determine whether the respondent has engaged in or is engaging in the civil rights violation with respect to the person aggrieved as *charged in the complaint*. (emphasis added). The matters set out by Complainant, which are not part of his Complaint cannot be considered by the ALJ. The Complainant had the opportunity to amend his Complaint to encompass any unlawful discrimination which is like or reasonably related to the charge and growing out of the allegations in such charge. 775 ILCS 5/8A-102(C)(1). The Complainant also had the opportunity to make a motion that the Complaint be amended to conform to the evidence prior to the close of the public hearing, orally or on the record. 775 ILCS 5/8A-102(C)(2). Complainant did not amend his Complaint nor did he move to amend his Complaint to conform to the evidence presented at the public hearing. Therefore, I will not consider those matters presented by Complainant that were not part of his Complaint or were previously dismissed by the Department or which pertained to a party not named in this action.

Recommendation

Based upon the reasons stated above, I recommend that the instant Complaint and underlying Charges of Discrimination of Lakeside Building Maintenance be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

BY:_____
NELSON E. PEREZ
Administrative Law Judge
Administrative Law Section

ENTERED: June 21, 2001